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# Does Law Promise Justice?

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## INTRODUCTION

"Justice being taken away, then, what are kingdoms but great robberies?"[1] The philosophy of law has long been dominated by a disagreement between those who say, with St. Augustine, "that an unjust law is no law at all,"[2] and those who respond, with John Austin, that "[t]he existence of law is one thing; its merit or demerit is another."[3] Against the latter camp—that is, against those who insist on a comprehensive separability of law and morality and, accordingly, on the contingency of any connection between positive law and justice—Philip Selznick, an eminent sociologist of law and a former colleague of mine at Berkeley, has offered the following admonition, which I would like to explore in this Article:

> It is important to preserve the distinction between law as an operative system and justice as a moral ideal. But clear distinctions are compatible with—indeed they are important preconditions of—theories that trace connections and reveal dynamics. Law is not necessarily just, *but it does promise justice.* We must look to the theory of law and justice to

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1. ST. AUGUSTINE, THE CITY OF GOD, bk. IV, ch. 4 (Marcus Dods trans., Hafner Publ'g Co. 1948).

2. ST. AUGUSTINE, ON FREE CHOICE OF THE WILL, bk. I, ch 5.

3. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

> understand why that promise exists and under what conditions it may be fulfilled or abridged.[4]

The idea is an interesting one. That it is typical of legal systems to hold out the promise of justice is exactly the sort of connection which, if it obtained, might be overlooked by a purely analytic jurisprudence. "Law is not necessarily just, but it does promise justice."[5] If one were focused too narrowly on the question of whether calling something "law" implies the *proposition* that it is just, one might not notice that the use of the term "law" to describe an institution for which one is responsible implies such things as an *intention* to be just or an *undertaking* to be just or perhaps even a *voucher* of justice.[6] (Such implications would be quite consistent with the analytic jurist's separability thesis, inasmuch as there is no necessary connection between intending something, promising something, undertaking something, or vouching for something, on the one hand, and something actually being done or actually being the case, on the other.)

A word like "hospital" provides a good analogy. One of the meanings given for hospital in the *Oxford English Dictionary* is "[a]ny institution or establishment for the care of the sick or wounded, or of those who require medical treatment."[7] No one understands the term "hospital" unless he understands what hospitals are *for*. To describe one's establishment as a hospital is to hold out the promise of healing and care—even though it might turn out that the procedures actually used in a given institution making this promise are in fact harmful or hurtful to the patients. Now, if their harmfulness or hurtfulness is known and intended, that belies the sincerity of the description: we assume that Dr. Mengele is being ironic when he talks about his clinic at Auschwitz as a "hospital." But we do not withdraw the term the instant harmfulness is discovered if we are sure that the institution in question has the treatment of the sick and the

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4. PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 443-44 (1992) (emphasis added).

5. *Id.* at 443.

6. Compare the very cautious formulation of Cardozo, who said that justice "remains to some extent, when all is said and done, the synonym of an aspiration, a mood of exaltation, a yearning for what is fine or high." BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 87 (1924).

7. 7 OXFORD ENGLISH DICTIONARY 414 (2d ed. 1989).

wounded as its aim. So this is a case in which the analytic separability of "hospital" and "actual non-harmfulness" conceals a deeper aspirational connection between the two.

Certainly it is right to emphasize, as the positivists do, that the mere fact that something is a legal system does not mean it is actually just. The positivists are right to reject the more categorical natural law formulations.[8] Still, we lose understanding if that analytic distinction is deployed as a way of blinding legal philosophy to other modes of connection between law and justice. For even if the two are not tightly analytically connected, it may be a mistake to see the non-analytic connections between them as purely contingent or adventitious.[9]

In this Article, I shall try to clarify this thesis about law promising justice and to distinguish it from one or two other claims with which it might be confused. I shall examine the way in which Selznick's claim might be supported; and I shall suggest that the claim needs to be modified to read that law promises a concern for justice, an interest in justice, but that it does not necessarily promise to get justice right. That, I suppose, is a weaker claim, but it is still strong enough to be at odds with some contemporary understandings (I have in mind particularly *economic* understandings) of law.

## I. LAW IN PURSUIT OF JUSTICE

Those in the positivist camp on this issue—those who stand with Austin—accept that justice is an appropriate normative standard to use in evaluating law, or in making a decision about what the law ought to be.[10] Some reject even that position. Hans Kelsen, for example, was a relativist about justice and thought that law was ill-served by justice, even as an evaluative standard.[11] Others deny that justice occupies any special

8. For a critique from *within* the natural law tradition of a too-hasty application of Augustine's "*lex iniusta non est lex*," see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 351-68 (1980).

9. *See* SELZNICK, *supra* note 4, at 444.

10. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 157 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) (1961) (noting the "peculiarly intimate connection" between justice and law).

11. *See, e.g.*, HANS KELSEN, GENERAL THEORY OF LAW AND STATE 5-8 (Anders Wedberg

position in the moral hierarchy, so far as the evaluation of law is concerned.

A claim that justice is an appropriate standard for assessing law need not rule out the pragmatic assessment of law along other lines. In many contexts justice is adverbial:[12] one may pursue a war on drugs, for example, either justly or without regard for justice. The thesis under consideration is that law promises that any aims that are pursued will not be pursued without regard to justice.

Some opponents, however, are not satisfied with this. Here I particularly want to spotlight the Law and Economics perspective. Members of the Law and Economics movement have argued that it is a mistake to orient ourselves towards justice in our normative thinking about the law; instead we should orient ourselves entirely towards efficiency or what is perhaps the same thing: welfarist standards of wealth-maximization.[13] By and large, they are not prepared to concede that this quest for efficiency should be constrained by any concern for distributive justice.[14] On the contrary, Law and Economics is usually associated with a dismissal of the importance of the distributive considerations that might figure in a justice-based constraint—a dismissal sustained in the Law and Economics tradition by some poorly thought-through inferences from an interesting argument by Ronald Coase.[15]

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trans., Russell & Russell 1961) (1945); HANS KELSEN, PURE THEORY OF LAW 49, 66-67 (Max Knight trans., Peter Smith, Inc. 1990) (1979).

12. I mean it operates as a Nozickian side constraint, rather than as an end in itself. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-30 (1974) (discussing the idea of side constraints).

13. *See, e.g.*, Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). I am not sure whether this means that Law and Economics scholars would deny that law promises justice. Probably they would skip the question as ill-formed or uninteresting, and just repeat that whatever law's promise, the maximization of wealth is the standard to which it should be held.

14. For an interesting recent exception, see Louis Kaplow & Steven Shavell, Principles of Fairness Versus Human Welfare: On the Evaluation of Legal Policy (March 2000) (unpublished discussion paper No. 277, Harvard Law School, John M. Olin Center for Law, Economics, and Business), *available at* http://www.law.harvard.edu/programs/olin_center/.

15. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Coase showed that under ideal assumptions (*viz.*, a world of costless transactions), the initial distribution of rights makes no difference to the pursuit of efficiency. But of course, it is fallacious to infer from this that efficiency *ought* to be pursued (even in a world of costless transactions) without regard to the distribution of rights.

A separate question is whether some aspects of morality (distinct from justice) are *in*appropriate for evaluating law. The view that they are is found in the legal philosophy of Immanuel Kant, who maintained that ethical considerations of inner motive, so important for personal virtue, are quite inapposite when evaluating what he called "external" or "juridical" law-giving.[16] Something similar is found in the views of liberal political philosophers who insist that law should stay away from issues of *personal* (e.g., sexual) morality.[17] Often this is because it is thought to be inappropriate or even impossible to govern inner convictions with the coercive mechanism of law.[18] It has even been argued, for example, by John Stuart Mill,[19] that the distinctive feature of justice is precisely its affinity with sanctions and enforcement, so that the special position of justice so far as the evaluation of law is concerned is almost analytic. But we need not go that far.

Indeed, the question I want to address is slightly different: Even if we acknowledge that justice is the appropriate standard

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16. IMMANUEL KANT, THE METAPHYSICS OF MORALS 46 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

17. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 9-13 (John C. Rees ed., Clarendon Press 1985); H.L.A. HART, LAW, LIBERTY AND MORALITY 1-6 (1963). For his part, Philip Selznick seems happy to accept this liberal view; that is, he accepts that a proper moral evaluation of law need not engage the whole of morality and that "justice" might be the appropriate word to label the portion of morality which is particularly suited to this task (as opposed to personal ethics, for example, or "the theory of the good"). *See* SELZNICK, *supra* note 4, at 428-34. Even his communitarianism is presented as "communitarian justice" where the legal structures are concerned. *See id.* at 445. Selznick is not one of those who *opposes* justice to the values of community. *Cf.* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 173-74 (1982).

18. *Cf.* JOHN LOCKE, A LETTER CONCERNING TOLERATION 19 (Mario Montuori ed., Martinus Nijhoff 1963) (1689).

> The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgement that they have framed of things.

*Id.*

19. In Chapter Five of *Utilitarianism*, Mill argues that the connection is based on the particular affinity between justice and the use of force. *See* 3 JOHN STUART MILL, DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 365-69 (Henry Holt & Co. 1882).

to use when evaluating law, is law itself oriented to that standard? Does law promise to satisfy this standard that morality holds out for it? Or does it have to be dragged across the gulf of positivist separability, kicking and screaming to the tribunal of justice?

## II. DOES LAW SHOW CONCERN FOR JUSTICE?

Our enquiry is about law as such. We are not asking a question like, for example, "Does law protect religious freedom?"—to which the answer would be: "It depends which system of law you have in mind. Some legal systems, like that of the United States, make this one of their constitutive aims. Others are indifferent to it, or if they secure it, they do so accidentally or as a result of contingent political outcomes." Thus, we want to know whether there is anything about law that shows a concern for justice, a concern to which one would then be committed once one decided to govern on the basis of law.

But "law as such" is a slippery phrase. Does it mean "law, by virtue of the very meaning of the word?" Is this something that could be looked up in a dictionary, or perhaps established by conceptual analysis? Alternatively, does it mean "all legal systems," in the sense of a universal generalization which a social scientist might try to refute or confirm?[20] Is there indeed any point in distinguishing between law as such and what we find to be typical of legal systems, as a matter of empirical generalization?[21] If we were to find as a matter of fact that most legal systems *do* promise justice, whatever "promise justice" means, which of course is something still to be untangled, why should we waste any time discussing whether this was something connected with law *as such*, rather than a mere correlation?

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20. And how universal is the generalization supposed to be? Are we to look at Roman law, early Germanic law, medieval canon law, American commercial law, Maori customary law, modern Norwegian criminal law, and so on, to see whether the appropriate correlations hold?

21. If we took the empirical approach, we might quickly end up with the conceptual question. Finding out that a system of governance did not promise freedom of religion probably would not lead anyone to raise questions about whether that system was a system of law. But finding out that it made no promise of justice might lead us to question exactly that.

I think the answer here has something to do with the special place of the rule of law in our constellation of political values. Joseph Raz has warned us against identifying the rule of law with all good things:[22] the rule of law, as such, does not imply democracy, for example, or the reduction of poverty, or respect for the environment. Instead the rule of law ideal has a more limited remit: (1) it picks out a particular set of features that a system of governance may have (for example, decision-making in accordance with public and relatively stable general laws); (2) it accounts for their importance (for example, in terms of the connection between publicity, predictability, and autonomy); and (3) it associates them, understood in this light, with the characterization of the governance system in question as a system of law.[23] One way of understanding the question I am asking in this Article is that I want to know the place of justice in this triad. Does an orientation towards justice figure—presumably at the second level—in our understanding of the rule of law? Is it part of the best explanation of the importance of those formal features of legal governance that the rule of law ideal picks out? Or is our understanding of the rule of law connected with other values quite separate from justice, and perhaps, as H.L.A. Hart is known to have suggested, values quite compatible with injustice or great indifference to justice.[24]

Thus, the idea of *law* picks out a distinct and valued mode of governance, a mode to be contrasted with personal rule and perhaps also with various forms of impersonal governance (such as managerial governance, like the governance of a firm).[25] This mode of governance is especially valued under the heading of "the rule of law." That it promises justice may be one of the reasons for its being valued in this way; that is, it may be one of the constitutive value claims that the rule of law ideal

22. *See* JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 210-11 (1979).

23. I fear that Raz does not accept the third piece of this triad. He seems to think that a system of governance may be a legal system and yet have few or none of the specific virtues associated with the rule of law. His position seems to be that the rule of law is a specific set of virtues that a legal system may or may not possess. So even if we were to show what Raz denies, that there is a connection between justice and the rule of law, Raz might still deny that there is any such connection between justice and law as such.

24. *See* HART, *supra* note 10, at 207 (suggesting that the internal morality of law, in Fuller's sense, is "unfortunately compatible with very great iniquity").

25. For this contrast, see LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969) 152-86.

comprises. So our reason for asking about law *as such* is closely akin to the reasons there are (if there are any) for packaging certain formal features and our account of their importance under the auspices of this label "the rule of law."

In addition, we may be interested in the relation between a putative promise of justice and the demand that law makes, above all schemes of governance, on our obligation, compliance, and respect. It is commonly thought that a system of law may make greater or morally more compelling demands on citizens than, for instance, a system of managerial direction or pure discretion. "Why is this?" we may ask. Clearly, if there were a connection between law and some promise of justice that one did not find in other systems of government, then this would be a promising place to look in order to explain the special moral demand of law.

## III. CONVEYING LAW'S PROMISE

I wrote earlier that a promissory connection between law and justice is exactly the sort of thing that analytic jurisprudence might miss, particularly if it already had in hand various examples of systems that were undoubtedly systems of law and were in fact also undoubtedly *un*just. However, the fact that the analytic jurist would likely miss such implications does not mean they *are* there in the case of "law." At the start, I mentioned the example of the word "hospital" and floated a possible analogy with "law." But words alone do not seem sufficient for law, in anything like the incontestable way they do for hospitals. After all, if the legal positivists have shown anything, they have shown that we *can* arrive at and work with a set of definitions for the main terms of general jurisprudence that eschew functional implications of the sort that everyone recognizes in terms like "hospital," medicine," etc.[26] Such definitions do not seem to do violence to the way these terms are ordinarily understood. Even if the opponent of positivism can *also* construct a set of definitions, consonant with "the

26. For the leading example, see Hart's characterization of his own theory. *See* HART, *supra* note 10, at 239-40. For a powerful critique, see Stephen Perry, *Interpretation and Methodology in Legal Theory*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 97, 112-21 (Andrei Marmor ed., 1995).

proprieties of linguistic usage"[27] and connoting some sort of inherent aspiration to justice, that simply shows that ordinary language is indecisive on this point, or that it embodies some ambivalence about a connection of this kind.

If the promise of justice is not conveyed semantically by the word "law" as an institutional self-description, how else could we know that this promise was being made? The clues to which Philip Selznick appeals are found in other aspects of institutional self-presentation. He says:

> [L]aw and justice have a special affinity . . . . In American life the association of law and justice is supported by considerable symbolism, some of which is writ in granite, as when we read on the frieze of the Supreme Court, "Equal Justice Under Law." The Constitution purports to "establish Justice"; our high courts are staffed by justices; the attorney general heads a Department of Justice.[28]

This is not a peculiarity of American law. Judges the world over are called *justices*, and lay magistrates *justices* of the peace. A great many countries have ministers and departments of *justice*, and many refer to their system of trial and punishment for crime as their system of criminal *justice*. Though the word "law" may not entail justice, certainly the dictionary meaning of "justice" recognizes the phenomena I have just mentioned. The *Oxford English Dictionary* notes, as one of its meanings, "[a] judicial officer; a judge; a magistrate," and as another (although obsolete), "[t]he persons administering the law; a judicial assembly."[29] Even the statue of the blindfolded goddess one finds atop courthouses (like the Old Bailey in London), with the sword and the scales, is called "Justice" or "Iustitia."[30]

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27. HART, *supra* note 10, at 209.

28. SELZNICK, *supra* note 4, at 435.

29. 8 OXFORD ENGLISH DICTIONARY 326 (2d ed. 1989). For an excellent discussion of the relevance of this sort of etymological connection, see MILL, *supra* note 19, at 365-66.

30. I assume that the prominence of this imagery is some sort of embarrassment for those, like Kaplow and Shavell, who believe that law should have nothing to do with justice (as opposed to wealth-maximization). *See supra* note 14 and accompanying text. But they may dismiss all of this as a relatively superficial indicator, or as evidence only of the extent to which legal rhetoric is contaminated by outdated and harmful standards of justice and fairness.

## IV. FINDING LAW'S AUTHORITY

How much of this is window-dressing? I do not mean: How much of it is belied by the actual *in*justice of the judgments and decrees administered by agencies with "justice" in their titles? Remember, we are not supposed to be asking whether laws and legal systems actually *are* just; we are only asking what sort of promise they hold out.

The situation is analogous, I think, to the suggestion by some positivists that law claims authority for itself. The best-known version of this is put forward by Joseph Raz. A legal system, says Raz, may in fact lack legitimate authority:[31] that may be the upshot of our application to it of the normative test for authority explicated in Raz's "normal justification thesis."[32] But law necessarily *claims* authority, he says.[33] (From this Raz draws some quite strong inferences. If the claim to authority is not to be nonsensical, Raz says, then law must have certain structural features:[34] we must, for example, be able to work out what the law is on some subject, without having to figure out on our own what the best thing to do about that subject is. And this, he says, already disqualifies some prominent theories like Ronald Dworkin's, which seem to require just that.[35] But that is a digression from our main concern.)

I wanted to use Raz's argument about law claiming authority simply as an analogy to help make sense of Selznick's view that

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31. *See* JOSEPH RAZ, *Authority, Law, and Morality*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 194, 199 (1994).

32. *Id.* at 198; *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM 38-69 (1986).

33. RAZ, *supra* note 31, at 199.

34. *Id.*

> A legal system may lack legitimate authority. If it lacks the moral attributes required to endow it with legitimate authority then it has none. But it must possess all the other features of authority, or else it would be odd to say that it claims authority. To claim authority it must be capable of having it, it must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority.

*Id.* Raz goes on to use this as a basis for the positivist's "sources thesis." *See id.* at 199-204, 214-19.

35. Ronald Dworkin seems to claim that in order to know what the law is on some issue, we must already have a sense of what justice requires on that issue, which can be factored in, along with fairness and integrity, to generate an answer to the legal question. Law could not plausibly claim authority in regard to the justice issue, says Raz, if we already have to rely on our sense of justice to find out what the law is! *See id.* at 209.

law promises justice whether or not it *is* just.[36] And in this regard, it is interesting that the evidence Raz adduces for the proposition that law claims authority is quite similar to the evidence that Selznick adduces for the proposition that law promises justice. Raz says: "The claims the law makes for itself are evident from the language it adopts and from the opinions expressed by its spokesmen, i.e. by the institutions of the law. The law's claim to authority is manifested by the fact that legal institutions are officially designated as 'authorities' . . . ."[37]

Raz's arguments therefore provide a nice paradigm for the case that Selznick wants to make. Law claims to be X—this is something we can tell from its institutional self-presentation—and that claim is important whether or not law actually *is* X. The claim may be window-dressing, but that does not deprive it of jurisprudential significance.[38]

## V. THE REAL-WORLD EFFECTS OF LAW'S PROMISE OF JUSTICE

Once again, let me emphasize that we are only talking at this stage about what law claims or promises, not about what law does. We are still on our question about window-dressing. Even window-dressing, however, can have real-world effects. The historian E.P. Thompson reminded us, in the famous coda on the rule of law in *Whigs and Hunters*, that those who seek to use law's pretensions to justice as mere window-dressing are likely to find themselves having to take their own "PR" seriously.[39]

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36. It may also be more than an analogy. If Raz is right, then law holds itself out as authoritative; and if he is right in his analysis of authority, law must hold itself out as serving extra-legal values or reasons. Raz's "service conception" of authority entails that an authority, A, cannot present itself as legitimate (say, to a person, P) except in reference to A's claim to help P act on reasons that would apply to P whether A existed and was legitimate or not. Of course it does not follow that those reasons, applying independently to P, are reasons of justice. They may be reasons of self-interest, or reasons of social wealth-maximization, or reasons of ordinary morality. But the evidence that Raz presents to show that law claims authority is also evidence that law claims to serve some other reasons, and those other reasons *may* be related to justice.

37. *Id.* at 199.

38. For other useful discussions of law's self-presentation, see generally LESLIE GREEN, THE AUTHORITY OF THE STATE (1988), and Philip Soper, *Law's Normative Claims*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 215 (Robert George ed., 1996).

39. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263 (Pantheon Books, 1st Am. ed. 1976) (1975). Thompson precedes this by saying:

> If the law is evidently partial and unjust, then it will mask nothing,

Law cannot acquire a reputation for justice, Thompson argues, "without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just."[40] This means that those who seek to benefit from this "spin"—those who want to take advantage of law's reputation for justice and impartiality to bamboozle the peasants and to project "the image of a ruling class which was itself subject to the rule of law"—may find themselves, "willingly or unwillingly, the prisoners of their own rhetoric." They cannot break those rules just whenever they like, "or the whole game would be thrown away."[41] So a promise of the sort we are considering might be effective to a certain extent, even when it is not motivated (on the part of those who make it) by a genuine desire for justice.

## VI. SUPERFICIAL PROMISES OF JUSTICE

However, I mentioned window-dressing to raise a different possibility: legal systems might associate themselves with "justice" at a relatively superficial level, while not holding out any deep or serious promise in that regard. The relationship might be like that of armed forces, in most countries now, to the ideal of national defense. By itself, the fact that in almost every country the ministry in charge of the armed forces is characteristically called "The Ministry of Defense" (rather than "Ministry of War," which used to be the favored appellation) hardly amounts to a serious undertaking that force will never be used offensively. One would have to be very naive to interpret it as such. And the same may be true of law's "promise" of justice.

One indication of relative superficiality would be the communication of mixed messages concerning justice in the self-presentation of most legal systems. For example, it is widely believed that lawyers regard any easy appeal to "justice" in a legal context as a sign of legal immaturity. And there is some

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> legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.

*Id.*

40. *Id.* (emphasis in original).

41. *Id.*

justification for this. "I hate justice," is what Oliver Wendell Holmes is reported to have said, "which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."[42] It was in those days, remarks Harold Berman, that a Harvard Law School student asked in class, "But sir, is that just?" and the professor replied, "If it's justice you're looking for, you should have gone to the divinity school!"[43]

The possible disconnect here takes us back to the points made by E.P. Thompson. Thompson's argument that even window-dressing has its effects depended in part on his understanding of the density and relative autonomy of the law as a science, a profession, and an institution. Not all forms of window-dressing are on par, and legal window-dressing is much more than mere advertising copy:

> In the case of an ancient historical formation like the law, a discipline which requires years of exacting study to master, there will always be some men who actively believe in their own procedures and in the logic of justice. The law may be rhetoric, but it need not be empty rhetoric. Blackstone's *Commentaries* represent an intellectual exercise far more rigorous than could have come from an apologist's pen.[44]

But if Holmes is right, if in the end the discipline of law—in the court, in the treatise, and in the classroom—eschews any promise of justice,[45] then the official nomenclature and the friezes and statues with which we decorate our courtrooms may turn out, after all, to be quite misleading as to whether any *serious* undertaking, in this regard, is embedded in the ethos of the legal profession.

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42. Letter from Oliver Wendell Holmes, Jr., to C.H. Wu (July 1, 1929), *quoted in* Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 416 n.199 (1998); *see also* Michael Herz, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 113 (1996) (discussing the reportage of Holmes's various *bons mots* in this regard).

43. Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 784 (1988).

44. THOMPSON, *supra* note 39, at 263.

45. *See* John Minor Wisdom, *Views of a Friendly Observer*, 133 U. PA. L. REV. 63 n.4 (1984) (quoting Judge Henry Friendly's explanation of Holmes's "I hate justice" as springing from and expressing "a normal appellate judge's revulsion at the too frequent ranting about justice which hopes to conceal either a weak case or a shoddy preparation").

I am not saying we should accept this. Many who quote the Holmesian admonition these days quote it as a dated curiosity and follow it with a cautionary tribute to the affirmative role of justice in modern legal thought.[46] But once again, if these things come and go with fashions (for example, among law students and law teachers), then it might be a mistake to associate law as such (as opposed to law here and now) with a promise or passion for justice.

## VII. FORMALISTIC JUSTICE

A different possibility, but, I think, even more unsettling from the point of view of the Selznick hypothesis, is that law's promise of justice might be restricted to a rather trivial or formalistic sense of "justice."

Since the time of Aristotle, we have known that justice has a general sense and a particular sense.[47] In its particular sense, it operates in a number of different spheres: distributive justice, corrective justice, commutative justice, retributive justice, political justice, and so on.[48] The claim we are examining is that law promises justice in all these spheres. This is either a retail claim—that criminal law promises retributive justice; tort law, corrective justice; the law of contract, commutative justice; and so on[49]—or it is a general, wholesale claim—that justice in the general sense is what law in general promises.[50]

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46. The authors of one coursebook write: "But today's practicing lawyer would make as grave an argumentative error to ignore justice considerations as a lawyer decades ago would have made to emphasize such considerations in front of a judge such as Justice Holmes." ANTHONY D'AMATO & ARTHUR J. JACOBSON, JUSTICE AND THE LEGAL SYSTEM: A COURSEBOOK, at xxi (1992). And in spite of Holmes's pronouncement, modern law reviews insist that justice is "a meaningful part of the judicial landscape." Paul E. Loving, *The Justice of Certainty*, 73 OR. L. REV. 743, 763 (1994); *see also* Berman, *supra* note 43, at 784.

47. ARISTOTLE, NICOMACHEAN ETHICS, bk. V, ch. 1 (Sir W. David Ross trans.), *in* 9 THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH (Oxford Univ. Press, photo. reprint 1949). This distinction holds whether we treat justice as an individual virtue or as a normative aspiration for a whole society.

48. *See id.* at bk. V, chs. 2-5.

49. Of course, the categories need not line up so neatly. For all I know, Selznick believes that tort law offers some appropriate balancing of claims of corrective justice and social justice. All I mean to emphasize at this stage is that Selznick's claim about law's promise of justice need not be embarrassed by the existence of the different kinds of justice specified above.

50. Thus as Aristotle says:

However, Aristotle draws a further distinction that cuts across these various spheres of justice: Aristotle distinguishes between natural justice and legal justice (and thus between natural distributive justice and legal distributive justice, between natural corrective justice and legal corrective justice, and so on). He says that, of political justice (namely, justice as applied or appealed to in a polis):[51]

> [P]art is natural, part legal,—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner's ransom shall be a mina, or that a goat and not two sheep shall be sacrificed, and again all the laws that are passed for particular cases, e.g. that sacrifice shall be made in honour of Brasidas, and the provisions of decrees.[52]

If law's promise of justice referred only to Aristotle's sense of *legal* justice, it would be a rather trivially self-fulfilling claim: law would be promising nothing but the justice of its own conventions in regard to the solution of pure coordination games.[53] It would be like a legal system promising to "get it right" as to which side of the road we should be required to drive on.

Hardly more inspiring is the loose identification between law and (legal) justice in Aristotle's *Rhetoric*: "Justice is the virtue through which everybody enjoys his own possessions in accordance with the law; its opposite is injustice, through which men enjoy the possessions of others in defiance of the law."[54] If

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> [E]vidently all lawful acts are in a sense just acts; for the acts laid down by the legislative art are lawful, and each of these, we say, is just. Now the laws in their enactments on all subjects aim at the common advantage either of all or of the best or of those who hold power, or something of the sort; so that in one sense we call those acts just that tend to produce and preserve happiness and its components for the political society.

*Id.* at bk. V, ch. 1.

51. *See id.* at bk. V, ch. 6.

52. *Id.* at bk. V, ch. 7.

53. I say *pure* coordination games because Aristotle says he is talking about "that which is originally indifferent." However, Hardie thinks there is ambiguity: "Is Aristotle thinking of rights and wrongs created by conventions, like the rule of the road, or of conventional ideas about right and wrong . . . ?" W.F.R. HARDIE, ARISTOTLE'S ETHICAL THEORY 205 (1968). I think it is pretty clear that in the passage under discussion he is talking about the former.

54. ARISTOTLE, RHETORIC, bk. I, ch. 13 (W. Rhys Roberts trans.), *in* 11 THE WORKS OF

law's promise of justice is simply that the legal system will vindicate, uphold, or enforce the rules by which it (the legal system) determines who owns what, then the promise, again, is relatively uninteresting. It is not trivial; it amounts to an acceptance of the discipline that Lon Fuller has called "congruity."[55] And we should not denigrate this aspect of legality. But for what it is worth, I think Selznick sees congruity—and related "principles of law" like prospectivity, promulgation, intelligibility, etc.—as "points of transition from law to justice," rather than as constituting in themselves the content of the actual *promise* of justice inherent in a legal system.[56]

## VIII. FORMAL JUSTICE

Something similar must be said about the relation between law and what is sometimes called "formal justice." When H.L.A. Hart wrote about the "peculiarly intimate connection" between justice and law,[57] he had in mind not only the demarcation within the realm of the moral that I raised at the beginning of this discussion, but also the fact that legal norms characteristically satisfy certain formal conditions, such as generality, which are usually taken to be necessary conditions also for justice.

> [J]ustice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as "Treat like cases alike"; . . . . The

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ARISTOTLE TRANSLATED INTO ENGLISH (Oxford Univ. Press, photo. reprint 1946). Certainly the *Rhetoric* acknowledges the idea of natural justice as well:

> Particular law is that which each community lays down and applies to its own members: this is partly written and partly unwritten. Universal law is the law of Nature. For there really is, as every one to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other.

*Id.* But nothing is said to indicate that the connection between *that* and the concept of a legal system is anything other than contingent.

55. FULLER, *supra* note 25, at 81-91. It may be less than this: possibly the most it amounts to is congruity so far as the actions of *legal* officials are concerned; further steps would be needed to show that law promised congruity of *all* official action or *all* state action to promulgated law.

56. SELZNICK, *supra* note 4, at 438-39.

57. HART, *supra* note 10, at 157.

> connection between this aspect of justice and the very notion of proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice.[58]

It seems undeniable that law as such does hold out the promise of something along these lines. Certainly this is part of what is meant by "the rule of law": to move from a non-legal to a legal mode of governance is to move to a situation in which there will be special and explicit concern for treating like cases alike, for universalization, and for proceeding in a rule-like manner.[59]

However, as Hart emphasizes, this sort of "universalness" or "rule-ness" is only *part* of what is meant by justice (in any sphere where justice is an issue). There are further questions to be settled about what should count as a relevant "likeness" for the purposes of treating like cases alike.

> [A]ny set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, "Treat like cases alike" must remain an empty form .... Without this further supplement we cannot proceed to criticize laws or other social arrangements as unjust.[60]

This supplement is what is sometimes referred to as *substantive* justice. Now, if what we mean by that is substantive *legal* justice (in Aristotle's sense of "legal justice"), then we are back with the trivialities I raised before. However, if we mean something that goes beyond that—say, substantive *natural* justice (in Aristotle's sense of "natural justice")—then it remains to be shown that *that* is in fact the promise held out by law.

I do think that this last claim—that law promises *substantive natural* justice—is the one that really interests anti-positivists like Philip Selznick, and in exploring the Selznick hypothesis, it is the one that interests me. Thus, Selznick says in *The Moral*

58. *Id.* at 159, 161 (emphasis in original).
59. *See* JOHN RAWLS, A THEORY OF JUSTICE 47-52 (rev. ed. 1999).
60. HART, *supra* note 10, at 159.

*Commonwealth* that merely formal legal justice is not enough because "[f]ormal justice tends to serve the status quo."[61]

> [L]egal "correctness" has its own costs . . . . Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of law. Rigid adherence to precedent and mechanical application of rules hamper the capacity of the legal system either to take new interests and circumstances into account or to remedy the effects of social inequality.[62]

Formal justice smacks of what he (and his co-author Philippe Nonet) called "autonomous law," as opposed to the "responsive law" they championed.[63] The impression they gave was that the sort of justice secured by autonomous law—regular, procedural, formalistic—is hardly the sort of justice we should cherish as the implicit promise of law and surely not the limit of justice that a legal system should aspire to.

What Selznick and Nonet *do* say, however—and this is repeated in *The Moral Commonwealth*—is that the guarantee of formal justice is in some sense the *vehicle* or the *medium* of law's promise of substantive justice. "Substantive justice is derivative, a hoped-for by-product of impeccable method.... In time, the tension between procedural and substantive justice generates forces that push the legal order beyond the limits of autonomous law."[64] The idea seems to be that formal justice itself—the very discipline "of subjecting conduct to the governance of rules"[65]—starts us down a road that heads inexorably in the direction of a growing commitment to "respect for the person, self-restraint in the use of power, and reasoned justification."[66] And this is not simply because such values already underlie formal justice and the rule of (autonomous) law, which is a point that John Finnis makes,[67] but also because formal legality provides our first lessons in, and our first

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61. SELZNICK, *supra* note 4, at 437.
62. *Id.*
63. *See* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 53-72 (1978).
64. *Id.* at 67.
65. FULLER, *supra* note 25, at 106.
66. SELZNICK, *supra* note 4, at 444.
67. *See* FINNIS, *supra* note 8, at 273-74.

opportunities for reflecting on, the paths of thought that will eventually be used to distinguish the substantively just from the substantively arbitrary.

## IX. FORMAL JUSTICE AS REASON-GIVING

Because I think this argument is extremely suggestive, I want to explore it further. The idea is that law already shows and teaches a sort of concern for substantive justice in its commitment to formal justice. It does so in its commitment to generalization and consistency (treating like cases alike), in its practice of reasoned elaboration, and in its use of that apparatus to frame the idea of relevant reasons and non-arbitrary decision-making. I know that people sometimes write dismissively about formal justice as though it were nothing but a formalistic word game and that, absent any direct commitment to the writer's favorite substantive values, the equations, calculations, and quantifications of formal justification are worthless. That is what people often say. They say if we do not have the correct substantive theory of which likenesses matter and which differences are relevant, our commitment to treating like cases alike amounts to nothing. Others (perhaps more moderate) say that our commitment to formal justice is, at best, a commitment to reason-giving; but even apart from the fact that we disagree about reasons, there are all sorts of reasons that have nothing to do with justice.

In reply to these positions, I think it is very important to stress the point that law's commitment to the consistency values of formal justice is not only a commitment to consistency and not only a commitment to reason-giving. It is a commitment to a particular kind of reason-giving—a kind of reason-giving closely connected to the sort of ethical individualism or individualization of reasons that is identified with justice in the most substantive sense of the word.

Any question of social decision that presents itself as a legal issue presents itself as an issue between two or more persons or parties within society. In law, the question is never just what the society, S, should do—should S pursue policy X or policy Y in some area? The question is always what should be done about this issue (X or Y) as between the interests at stake of two elements of the society, the two parties, $s_1$ versus $s_2$. And when

an issue is presented like that, we do think it scrupulously important in law to get the issue focused in a way that is particularly attentive to what the parties—$s_1$ and $s_2$—have at stake in the matter. It is not enough to get the choice right as between policy X and policy Y: we must get it right so far as its distinctive bearing on *these two litigants* is concerned. That is the focus in law, and all we do about consistency and relevant reasons and treating like cases alike is done in that focus, rather than on the merits of X and Y considered on a broader front.

Not all decision-making is like that. In a legislature, we might pursue the issue between X and Y in a purely cost-benefit way, counting all the benefits that would accrue to anyone in society and counting all the costs, not particularly worrying about where the costs fall and why, provided we are assured that they are outweighed by the benefits or that the winners gain enough so that they could, in principle, compensate the losers and so on. (Not that we envisage such compensation being paid. On the contrary, it is often a condition of the benefit accruing that it *not* be redistributed. In the case of an incentive, for example, the benefit might not accrue at all if the person to whom it would accrue in the first instance knew that a substantial amount of it would have to be transferred to a loser. But often we do not worry about that: it is the notional gain in overall wealth or utility that concerns us.) In law, by contrast, we are supposed to focus steadfastly not only on the reasons for preferring policy X to policy Y but also on the reasons relevant to that choice which particularly justify the specific matrix of costs and benefits that might accrue to these two individuals from a decision one way or the other. Our reason-giving, our distinction between relevant and arbitrary reasons, our commitment to treating like cases alike are all pitched at the level of the payoffs for these two individuals. Even in cases where, in some sense, society itself is a party—in a criminal prosecution, for example, s versus $s_1$ (*"The People vs. $s_1$"* or *"United States vs. $s_1$"*)—the structure of action always requires us not to consider only the broad array of reasons relevant to the society's decision, with the impact on poor $s_1$ considered as a sort of incidental fallout. In criminal law, we highlight the impact on $s_1$, and we make prodigious efforts to check that there is nothing in $s_1$'s circumstances to warrant withholding a burden or penalty that would otherwise be placed upon him: we check that he has been properly treated in the

system, that he has no defense, justification, excuse, or extenuating circumstances. In other words, we try to focus our reason-giving with that impact firmly in the foreground. Even when we are in effect choosing a new rule, we are attentive to this aspect of the matter: we ask not only whether it is a good idea in general to have this rule but also whether it is a good idea to have a rule which would have this sort of impact on individuals like $s_1$. And whether it is in private law, criminal law, or elsewhere, the fine-tuning we do with regard to our pursuit of a particular policy is always done, not on a general front, but with regard to defenses and exceptions and justifications and so on, which are assessed as reasonable or unreasonable with regard to the question of whether $s_1$ should bear this sort of burden in this sort of situation.

Notice that this is the focus in actual litigation and decision-making in court, as well as in the whole development of the legal tradition. Jurists, treatise writers, and criminal theorists devote their energy to evolving and fine-tuning a consistent set of norms that deal with these individual questions appropriately.[68]

In this sense, then, our commitment to formal justice is oriented at least to this aspect of substantive justice—that outcomes to individuals matter and that aggregate justifications are in their very nature unsatisfactory because they treat outcomes to individuals as sort of incidental side effects, rather than the essence of the issue.

At the beginning of this Article, I mentioned the Law and Economics school, and I want to come back to them now because what I have just written is of course at odds with the kind of approach that they urge to legal decision-making. In general, Law and Economics urges exactly the sort of approach that I have said law as such rejects: when a dispute between two litigants, $s_1$ and $s_2$, presents an issue that can be identified as a choice of rule or policy, X versus Y, then we should base our decision on the efficiency or wealth-maximization advantages of X over Y, or vice-versa, for society S generally, letting the

68. I am grateful to Jim Evans, of the University of Auckland, for insisting on this point.

costs and benefits of that decision tumble out haphazardly over $s_1$ and $s_2$ and others in a similar position.

Law and Economics scholars are encouraged in this attitude by a theorem proved in Ronald Coase's classic article, *The Problem of Social Cost*.[69] Coase showed that under ideal assumptions (namely, a world of costless transactions), the initial distribution of rights makes no difference to the pursuit of efficiency. It would seem to follow that law, in a non-ideal world, should not, therefore, be too preoccupied with how rights fall out as between the parties. Coaseians acknowledge that the way rights are distributed at the beginning of the efficiency-seeking process will certainly make a difference to the distribution of wealth at the end. But they believe that if one were interested in the distributive features of the outcome, this would have to mean one was interested in the distributive starting point—and that, they think, is a mistake. Be that as it may, there is a fallacy at the base of this attitude. From the fact that the initial allocation of rights does not matter to the pursuit of efficiency, it cannot be inferred that efficiency *ought* to be pursued without regard to the distribution of rights. The initial allocation of rights may matter for reasons that have nothing to do with the pursuit of efficiency. And if—as I am suggesting—law as such focuses steadfastly on the distributive aspect of rights allocations, or more generally on the distributive aspects of the allocations of costs and benefits as between individuals, then Coase's theorem is largely irrelevant to legal decision-making as it is traditionally conceived.

Notice that this critique has nothing to do with issues about the ideal assumptions of the Coase theorem (absence of transaction costs, etc.). I think that in itself is a perfectly sound assumption because it helps cast light on ways in which law might supplement markets in doing what markets do. But of course that would not show, or even tend to show, that what markets do—secure efficiency without reference to distribution—is what law ought to be doing.

Perhaps what the economists are claiming is that law should abandon its distributive interest or that we should abandon law (to the extent that this interest is intrinsic to law). And maybe

69. Coase, *supra* note 15.

they are right; maybe we should. Maybe when we are presented with the choice between two policies, X and Y, with the following payoffs for persons $s_1$ and $s_2$,

| | X | Y |
|---|---|---|
| $s_1$ | u/2 | u |
| $s_2$ | u/2 | 0 |

we should be more interested in the respects in which they are similar—aggregate utility the same, average utility the same—than in the respects in which they are different—$s_2$ gets something in one, nothing in the other. Or maybe if a third possibility, Y*, was envisaged, with an additional increment of utility to $s_1$,

| | X | Y* |
|---|---|---|
| $s_1$ | u/2 | u/2 + v |
| $s_2$ | u/2 | 0 |

we should see immediately that Y* is the one to choose whenever $v > u/2$, because Y* involves a genuine increase in wealth. (Especially when $v > u/2$ from $s_2$'s point of view, so that $s_1$ gains enough to compensate $s_2$—not that any one is proposing that the compensation actually be paid!) So maybe. And maybe we should not obsess about whether the compensation is paid or not. Maybe we should not obsess about the distributional matrices at all. But I think we would need very powerful arguments to convince us to abandon law's traditional preoccupation with the distributive features that distinguish X from Y and that make the move from X to Y* a matter of grave distributive concern. The Coase theorem, which shows only that the single-minded pursuit of efficiency need not involve any sensitivity to rights, does not even begin to address that issue.

## X. SUBSTANTIVE JUSTICE

Law promises some sort of interest in *substantive* justice, and to a large extent, this promise is embodied, not only in its symbols and labels, but in the way it already secures *formal* justice—this argument is powerful and important. In its depth

and thoughtfulness, it is a standing reproach to the desiccated simplicities of the modern positivists' "separability thesis."

Still, someone might say, at the end of the day this is just a formalist argument. Law makes its promise in virtue of its form—the individualized forms of adjudication and the individualized forms of reason-giving, relevance, and arbitrariness associated with the elaboration of rules.

Is it possible that law as such could go beyond that and make a promise in regard to the substantial justice of its outcomes? I am inclined to think not, and I want to finish the Article with a brief explanation of why.

Legal systems typically exist in communities in which *some* of whose members, at least, hunger and thirst after justice. No doubt there are many who loathe the idea or deny that justice is any different from power, interest, or aggregate well-being. But for those with a taste for it, the law of their community will seem the most appropriate field for the cultivation of this virtue.

Unfortunately, however, the conflict between those who care for justice and those who do not is not the only conflict in society. As important—probably much more important—is the conflict *among* those who care about justice and desire to embody it in law but who disagree about what justice amounts to or how it is best promoted. Liberals disagree with conservatives; Rawlsians disagree with Nozickians; socialists disagree with market economists; the party of freedom disagrees with the party of equality; last-ditch defenders of the welfare state disagree with triumphant opponents of taxation; and pragmatists and utilitarians disagree with those who think the task of law is to vindicate the claims of order, retribution, and desert. Elsewhere—in *Law and Disagreement*—I have argued at length that such disagreement about justice is the staple of political competition and the presupposition of any interesting theoretical claim about legal institutions and about the separability of law and morality.[70] Thus, if law does promise justice, the promise must be understood against this background.

A rather superficial way of pursuing that last point would be to ask: "So *whose* justice is promised by the law? Justice as I see

70. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 1-8, 101-06, 188-204, 224-31 (1999).

it, or justice as my ideological opponent sees it?" But this, I think, is hopeless. For law's promise—if it does promise justice—is surely made wholesale not retail: it is a claim in respect of *law as such*, and not only in respect of those laws which happen to coincide with the justice commitments of whoever is voicing or responding to the claim. I have mentioned already that law makes whatever claims it makes against a background of disagreement about justice. That disagreement has a political and institutional correlate in almost every modern legal system. Parties compete for the right to make and interpret law, and because the modes of such competition are layered and various, at any given time the laws in force in a given society will include disparate norms based on mutually opposed conceptions.[71] Because these norms cannot all be just, no credible justice claim can be made on behalf of them all.

Therefore, we have to modify the position. I do not think this means that the economists are right and that law has nothing to do with justice. I do not think this means that law's claim has

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71. Here is how I put the point in *Law and Disagreement*:

> We need principles of fairness because, as I said, people disagree about justice. Attractive principles of fairness are unlikely to confer decisional authority on the partisans of just one of the competing views about justice. Over time in a democratic society, political power can be expected to alternate back and forth between the major competitors (between conservatives and social democrats, for example). And even in a given period, constitutional arrangements will often ensure that no one party or faction monopolizes all the bases of current decision-making.
>
> A past political decision has current force in a society if it has established a standing institution, rule, policy, or principle that continues to govern some aspect of social life. What I have just said about principles of fairness raises the possibility that some of the political decisions currently in force will be based on views about justice that are at odds with those underlying some of the other political decisions currently in force. When conservative parties replace social democratic parties in power, they seldom attempt to wipe the slate clean. Many decisions and practices inspired by social democratic values will remain in effect, coexisting uneasily with the fresh decisions of the new regime. Moreover, though the leadership of the society may be conservative, there will still be judges and officials who hold power on a basis that is independent of that leadership and who may continue to refer to social democratic ideals in their decision-making. Checks and balances, the separation of powers, and a history of political competition are thus likely to yield a patchwork of standards and institutions which no political party and no conception of justice can acknowledge as peculiarly its own.

*Id.* at 188-89 (footnote omitted).

nothing to do with justice, but it does mean that any promise it makes concerning justice must be a complicated promise.

Might the promise be that even though some laws are undoubtedly unjust, nevertheless, abiding by established law in all cases is the best long-term strategy for the pursuit of justice in society? Might we not say that, even if law does not promise perfect justice, it still promises as much justice as possible, as much justice as it is reasonable to hope for?

Unfortunately, however, there is nothing particular about law to make this credible. The plausibility of such a promise would have to depend on some feature of the procedures by which laws are made: roughly, the claim would have to be that the procedures are likely to generate a greater number of just than unjust outcomes (adjusting for the seriousness of the issues at stake) or likely to generate a greater preponderance of just outcomes than any other procedure one might use for deciding which edicts to comply with.[72] Claims of this sort are sometimes made (whether credibly or not) for democratic institutions.[73] But they are seldom made for law as such because they involve an investment in the quality of law-making procedures that jurisprudence usually disdains as "political."

We are left, then, with the point that what law promises, in virtue of its form, in virtue of the kind of institution it is, is an interest in justice, a concern for justice—even though it can make no promise as to how that concern will play out in the particular political circumstances of a given society. Now this, more or less, is where we were with our discussion of formal justice. Remember my position that law's promise concerning substantive justice is conveyed in law's commitment to, indeed law's guarantee of, formal justice.

However, I can think of a second complicated claim about justice that *is* associated specifically with the law. This is the claim that law helps us *coordinate* the pursuit of justice. In his book *Natural Law and Natural Rights*, John Finnis draws

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72. The claim here might be that law-making and law-following are best from the point of view of imperfect procedural justice. Imperfect procedural justice is what we appeal to when we say, for example, that in the long run fewer innocent people are likely to be convicted if we follow the rules of criminal procedure than if we try and aim at the desired result more directly. *See* RAWLS, *supra* note 59, at 74-75.

73. *See, e.g.*, Brian Barry, *Is Democracy Special?*, *in* PHILOSOPHY, POLITICS AND SOCIETY 155 (Peter Laslett & James Fishkin eds., 5th series, Basil Blackwell 1979).

attention to the coordinative role that law must play in any community whose members have come up with rival schemes for pursuing justice.[74] In any area where justice requires concerted action, the community must find a way of choosing which scheme to pursue. Unless such a choice is made, the members of the community will not know what is required of them: unless a particular script is chosen authoritatively, they will not know what role to play. Consider two rival schemes, $J_1$ and $J_2$, each purporting justly to address the problem of injury due to accidents: $J_1$ may be a New Zealand-style scheme of "accident compensation," administered by the state and financed out of taxation (or out of levies on hazardous activities), while $J_2$ may be a scheme of traditional tort law. That a particular scheme, $J_1$, is the law in a given jurisdiction (say, New Zealand) represents the fact that $J_1$ has been chosen authoritatively over rival schemes for the doing of justice in regard to this set of problems. Now the proponents of $J_2$ may think their country's choice inferior. But unless they think $J_1$ is so inferior that its pursuit by the community is worse than the community not doing anything at all to address justice issues raised by accidental injuries, they will recognize the importance of playing their part in the legally designated scheme and not the one they favor.[75] Of course, the mere fact that $J_1$ rather than $J_2$ has been legally designated is not an absolute guarantee that coordination will in fact take place around $J_1$. The society may be lawless (for example, most people may take no notice of authoritative pronouncements), or law may be on its last legs in the society as a basis of coordination. But if law does promise anything in regard to justice, it seems to me that this is what it promises: not that the legally designated scheme is the most just, but that the legal designation will secure the coordination that any doing of justice requires. Law's failure to deliver on this latter promise would amount to a failure of it *as law* (which can

74. FINNIS, *supra* note 8, at 231-33; *see also* Jeremy Waldron, Lex Satis Iusta, 75 NOTRE DAME L. REV. 1829 (2000) (discussing the implications of Finnis's approach more extensively).

75. The premise is stated by Finnis as follows: "[U]ntil a particular choice is made, nothing will in fact be done. Morever in some forms of human community, that something be done is not just a matter of optional advantage, but is a matter of right, a requirement of justice." FINNIS, *supra* note 8, at 232.

hardly be said for a failure of any putative voucher by the law that the designated scheme is the most just).

This promise of coordination might also apply to other aims that law has: coordination for the common good, or for culture, or for wealth-maximization. In each case, it is less credible to say that law as such vouches for the goal that is being pursued, more credible that it promises coordination in pursuit of such goal. But the point about coordination may have special relevance for justice. In many areas, it may not be possible to pursue justice piecemeal (through one's own efforts, irrespective of what others in society are doing), in the way that it is sometimes possible to unilaterally pursue goals like culture or wealth-maximization. Thus, in some areas, justice is essentially *comparative*, so that what it is just for A to do about B may be interdependent with what it is just for C to do about D; if A and C do not coordinate their pursuit of justice, injustice may result no matter how just each of their unilateral responses to the particular case in front of them may seem.[76]

Even if justice in these cases is not inherently comparative, powerful arguments can be made that the *enforcement* of justice introduces an indispensable requirement of coordination. One such argument is made by Immanuel Kant, to the effect that coercion may only be used under conditions of strict reciprocity.[77] Force may not be used against B in the name of justice unless B has an assurance that the same force, applying the same principles, will be used in the same way against any relevantly similar case (such as the case of D). It is not sufficient for A to show that he is treating B in the spirit of "universalness"—that *he would* apply the same principle to D's case if he were dealing with D's case. If D is *in fact* being treated (by C) under a principle different from the one that A is applying to B, then B has not been given the assurance that alone can make the use of force against him legitimate.[78] Another argument is made by Ronald Dworkin in *Law's Empire*.

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76. For the distinction between comparative and non-comparative justice, see JOEL FEINBERG, *Noncomparative Justice*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY (1980).

77. *See* KANT, *supra* note 16, at 55-58.

78. For a more protracted statement of this argument, see Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1539-40, 1560-62 (1996), *reprinted in* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 38-39, 52-57 (1999).

This is an argument that force used in the name of justice can claim legitimacy only against a background of associative obligation, and associative obligation in turn requires attention not just to abstract justice but to the integrity—the principled consistency—with which justice is being pursued by various agents in the name of the community across various times and situations.[79]

## CONCLUSION

At this point, exasperated readers may complain that we have come around in a big circle and ended up with formal justice again—treating like cases alike, which we said earlier was at best a necessary, but not a sufficient condition for substantive justice. So is this what my conclusion amounts to—that formal justice is the most that is promised by law?

No. At least three aspects of the position I have developed go well beyond this formalism.[80] First, law promises coordination in any enterprise it undertakes, whether that is substantive justice or the maximization of well-being, and whether that coordination happens to require formal consistency depends entirely on the nature of the enterprise. Second, so far as substantive justice is concerned, law promises consistency not for consistency's own sake, or in virtue of law's own formal ("rule-like") character, but because (if Kant is right or if Dworkin is right) principled consistency is normatively indispensable in the forcible pursuit of substantive justice. (If anything, law's formal consistency is explained by this requirement, not the other way around.) Third, law promises coordination and the principled consistency that coordination requires (in the case of substantive justice) because this is all it *can* promise—and this, at least, is what it *must* promise—in a community whose members disagree with one another about what substantive justice amounts to.

Together, these add up to something quite close to Selznick's position. There *is* a relation between law and justice (which a purely analytical jurisprudence is in danger of overlooking).

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79. *See* RONALD DWORKIN, LAW'S EMPIRE 190-216 (1986).

80. *See id.* at 219-24. Dworkin begins the discussion: "Is integrity only consistency (deciding like cases alike) under a prouder name?" *Id.* at 219.

Law flourishes in communities whose members are committed to the pursuit of substantive justice, but it must make its claims and hold out its promise against the background of their disagreement in that regard. In a society without disagreement, law's promise would likely be quite different; but it is also true that the whole business of governance would look quite different—and I think quite unlike what we are accustomed to calling "law"—if the aspiration to justice were lacking in society, or if most people committed to justice did not also regard law as the appropriate vehicle for its pursuit. Dworkin expresses this point nicely in the following passage:

> We accept integrity as a political ideal because we want to treat our political community as one of principle, and the citizens of a community of principle aim not simply at common principles, as if uniformity were all they wanted, but the best common principles politics can find. Integrity is distinct from justice and fairness, but it is bound to them in that way: integrity makes no sense except among people who want fairness and justice as well.[81]

Given that we (or many of us) *do* hunger for justice and *do* disagree, law's promise must not be for justice as such, but for the coordination that is necessary in any context in which the pursuit of justice, according to each individual's views, is in danger of becoming haphazard and self-defeating. That, then, is a promise *about* justice, not a promise *of* justice. Philip Selznick is right to see that law's promise with regard to substantive justice does have something to do with its formal properties: consistency, congruence, and the rule of law. And he is right, too, to see that these have a moral significance that goes well beyond any technical preoccupation with the logic and procedures of legality.

81. *Id.* at 263.